In the Supreme Court of the United States.

No. 225.—October Term, 1902.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR, AND MOTION TO AFFIRM.

Comes now the said defendant in error by his counsel, appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment which is by said writ of error brought up to this court for review is the judgment of the Supreme Court of one of the United States; to-wit, the Supreme Court of the State of Minnesota, and does not involve or present any federal question for the consideration of this court, nor did any federal question arise therein for determination, nor was any such federal question properly or seasonably raised or presented in said state court, or decided by it, or necessarily involved or considered therein. This motion is made upon the entire Transcript of Record herein.

And said defendant in error, by his counsel as aforesaid, also moves the court to affirm the said judgment so brought up by said writ of error, if the court shall deem that it has jurisdiction, because, although the record in the cause may

show that the court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, and because it is also manifest that the question on which the jurisdiction depends is so frivolous as not to need any further argument.

FRANK B. KELLOGG, ROBERT TAYLOR,
WESLEY A. SPERRY and LEWIS L. WHEELOCK,
Counsel for defendant in error for the purposes of these motions.

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Against

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20 To H. W. CHILDS and J. A. SAWYER, Esq., Counsel for said Plaintiffs in Error:

Please take notice that on Monday the ninth day of March, A. D. 1903, at the opening of said court on that day, or as soon thereafter as counsel can be heard, at the United States Supreme Court Rooms, in the Capitol, at the City of Washington, in the District of Columbia, the motions of which the foregoing are copies and are herewith served upon you, being a motion to dismiss the writ of error in said cause, for want of jurisdiction, for that no federal question is
30 involved or presented in the record, and also the motion, united therewith, to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ of error was taken for delay only, and also because it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument, will be submitted to said Supreme Court of the United States for

its decision thereon. Annexed hereto and served herewith is a copy of the brief of argument of said defendant in error to be submitted with said motions in support thereof.

Dated this tenth day of February, A. D. 1903.

Yours respectfully,

FRANK B. KELLOGG, ROBERT TAYLOR,
WESLEY A. SPERRY and LEWIS L. WHEELOCK,
Counsel for defendant in error, for purposes of the said motions.

In the Supreme Court of the United States. October Term, 1902. No. 225.

JOSEPH A. SAWYER AND NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

BRIEF OF ARGUMENT OF SAID DEFENDANT IN ERROR, UPON THE FOREGOING MOTIONS.

STATEMENT.

This is an action begun and prosecuted to final judgment in the state courts of the State of Minnesota for the foreclosure of mortgage lien or liens owned and held by said defendant in error (who was plaintiff in the cause in the state court) upon about 790 acres of land of said plaintiffs in error, (who, with one L. C. Woodman, were defendants in that court).

On February 19, 1895, said defendant in error was the owner and holder of three separate mortgages and the debts secured thereby, all given by plaintiffs in error upon said lands and all past due, to-wit; the Woodman debt and mortgage of April 1, 1892; the Deats debt and mortgage of Nov-

ember 1, 1893, and the Piper debt and mortgage of January 23, 1894; aggregating something more than $17,000. And there was also standing against the land another and prior debt and mortgage of $5,000 and considerable past due interest, the principal of which was not then due, given also by plaintiffs in error, designated as the Willis mortgage in the record, and dated July 21, 1890, and payable in five years after its said date. (See Transcript of Record, folios 1 to 8, 14, 15, 18, 19, 20, 27, 28, 29.)

On said February 19, 1895, said plaintiffs in error, as parties of the first part, the defendant in error as party of the second part, and said L. C. Woodman as party of the third part, made and entered into the written agreement of that date set forth in the Record on pages 5 and 6, in folios 9, 10 and 11, the essential provisions of which are as follows: That defendant in error should, and he did, pay and take assignment to himself of all other mortgages on said land, (i. e. of the said Willis mortgage, which was the only other one existing), folio 3, page 2, folio 8, page 4, and folio 18, 19, 31); that plaintiffs in error should convey all said lands by deed to defendant in error (which was done, folio 8, page 5; folio 20, page 11, folios 22 and 23, page 12, and folio 29, page 16); that plaintiffs in error should pay defendant in error thereafter "the full sum of one hundred dollars per month payable "on or before the last day of February, A. D. 1895, and on "or before the last day of each and every month thereafter "continuously." * * * That defendant in error execute and place in escrow in the hands of said Woodman as depositary a warranty deed of said lands running to plaintiffs in error, "to be held in escrow by said Woodman until said "party of the first part" (plaintiffs in error) "shall have paid to "said party of the second part all said monthly payments "above stated and also the sum of twenty thousand and four "hundred dollars ($20,400), said payment of said principal "sum to be made at such time or times as may be determined "by said parties of the first part, they having the privilege of

"paying any sum not less than fifty dollars at any time "thereon: It being agreed and understood that said "parties of the first part shall become entitled to the delivery "to them or their assigns of said deed held by said "third party in escrow as above, at any time whatever, pro- "vided only that they continuously pay said $100 monthly "and also pay said sum of $20,400 in time and manner as "above; and it is further provided that said monthly pay- "ments shall be diminished from and after any payment up- "on said $20,400 in the same proportion which the sum or "sums paid thereon bear to said total sum of $20,400. Pro- "vided further that upon failure by said party of the first part "to pay said monthly payments, all their rights hereunder "shall cease and determine." Some minor provisions of the said contract (which is set out in full in the record at folios 9, 10, 11) are omitted in the above statement thereof, they having no bearing on the questions to be considered. The "escrow deed" was executed and deposited with said Wood- man who accepted it and held it as such depository. (Folio 11,—last part,—and folio 30,—first part.)

Plaintiffs in error made such monthly payments for eleven consecutive months, till December 31, 1895, and then defaulted, and never afterward paid anything. Nothing what- ever was paid on principal. (Folios 12, 14 and 31.)

The complaint sets forth all the facts, all of said debts, notes and mortgages, deeds and contracts, and said entire transaction of February 19, 1895, the assignments of the mortgages, and all the facts in full including the said default, alleges insolvency on the part of plaintiffs in error and that the value of all said lands is less than the amount due in said matter to defendant in error. The prayer is for judgment determing the amount due thereon and for a strict foreclosure of said contract and all said mortgages, unless redemption be made within one year after entry of such judgment by pay- ment of the amount so adjudged to be due; and that said escrow deed be then cancelled: Or, in case the court deem

it inequitable to so adjudge a "strict foreclosure," that said contract and all said mortgages be by and under the judgment of the court foreclosed by sale of said mortgaged premises to satisfy the amount so adjudged to be due; and for such other and further relief as to the court may seem just and equitable. (folio 13.)

The record of the trial in the *nisi prius* court is found on pages 10 and 11 (folios 17 to 20 of the Transcript of Record herein.) There was no dispute as to the facts: The contention between the parties being only upon the question of what is the proper construction and legal effect of said agreement and transaction of February 19, 1895. Plaintiffs in Error contended that it constituted a new and independent, equitable mortgage for the new principal sum of $20,400 and said monthly payments of $100, and that it extinguished entirely by merger all the four original mortgages and the debts secured thereby; while defendant in error contended that it was but a provisional modification of those original securities, waiving the default already made in their terms and saving plaintiffs in error from all default therein so long as they should continuously make the said monthly payments of $100, and giving them an option to pay upon the principal sums, at any time or times and in any sums not less than $50, as might be determined by themselves, and thereby become entitled, upon such payment of said sum of $20,400 and the continuous payment monthly till then of said additional instalments of $100, to a delivery to them of said escrow deed of warranty, which should thereupon, as a matter of course, clear the land in them from all such incumbrances held by defendant in error; that it did not create a new debt of $20,400 payable at all events, or enforceable at any time against plaintiffs in error, either as a personal claim or as an enforceable lien upon the land, but payable only at the option of plaintiffs in error; that so long as they faithfully kept up such monthly instalment payments, their said option continued

good by the terms of the contract, but that by its express terms when they made default in such monthly payments all their rights under said contract ceased and determined, so that a cause of action for the enforcement of the original mortgages and mortgage debts according to the terms thereof arose, because of such default, just as if said contract had never been made, they having credit only for the sums actually paid during such intervening time; that such continnous payment of $100 each month would prevent the arising of any cause of action on said original mortgages and of course would prevent the running of the statute of limitations because no cause of action could arise, against which such limitation could run. Plaintiffs in error on the other hand urged, as an argument in snpport of their contention for the extinguishment of the original securities by merger, that, otherwise, plaintiffs in error could, by the continnous payments of the monthly instalments, prevent the enforcement of the original debts and securities until they should be barred by the running of the statute of limitation. (Folios 18 to 20 inclusive.)

Defendant in error further contended that while he claimed that the contract and transaction of February 19, 1895, did not extinguish by merger the original mortgages and mortgage debts, he was entitled in case the Court should determine otherwise, to a judgment of foreclosure in this action, of the said contract and transaction of February 19, 1895, as an equitable mortgage against the lands for the amount found due thereon. This is disclosed by the brief of plaintiffs in error at folio 67 on page 36.

At the opening of the trial plaintiffs in error offered to allow the defendant in error to take a decree of foreclosure in this action, based upon and for the amount provided in said contract or agreement, which offer was declined by the counsel of defendant in error. This offer and declination was made part of the record by settlement of a case to go to the Supreme Court of the State. See page 10 in folio 17.

The trial court sustained the contention of the defendant in error, holding that said original mortgages were not extinguished by said contract of February 19, 1895, and rendered judgment accordingly, folio 32 and 33.

The plaintiffs in error thereupon moved the trial court for an amendment of its findings of fact and conclusions of law, as set out on pages 19 and 20 of the Transcript of Record, seeking among other things for a determination by the court, as conclusions of law:

First, that said original mortgages were extinguished by merger in said contract as an equitable mortgage (see paragraphs 1 and 2 in folio 36), and that defendant in error had elected at the opening of the trial not to accept said offer for the foreclosure of said contract as an equitable mortgage, and was therefore not entitled to any relief in this action (see subdivision 3 in folio 36) and that the plaintiffs in error were entitled to a judgment that the action be dismissed (see subdivision 4 in folio 37) which motion did not prevail. Plaintiffs in error having appealed the cause to the State Supreme Court, they again argued in that court, first, that said original mortgages were so extinguished by merger (see folios 52 to 62 inclusive) and second, that defendant in error was not entitled to a foreclosure in any event of said equitable mortgage, on the ground that he was bound and estopped by an election to stand for the foreclosure of the original mortgages only, by his said refusal to accept the offer of such foreclosure on the trial. See folios 62 to 64 inclusive, and folios 67 to 70 inclusive.

The first of these contentions was decided by the State Supreme Court in favor of the plaintiffs in error, said court holding that said original mortgages were extinguished by merger, but their said second contention was overruled by the Supreme Court of the State, which held the defendant in error was entitled to a foreclosure of the said contract and transaction of February 19, 1895, as an equitable mortgage for the amount due, according to its terms, and that court

reversed the judgment of the court below and remanded the cause to the trial court, with express directions that that court proceed to determine the amount due upon said equitable mortgage, amend its findings of fact to correspond, and also amend its conclusions of law in accordance with the views of the Appellate Court. See folios 105 to 110.

Thereon the plaintiffs in error petition the Appellate Court for a rehearing and for a modification of its decision, by omitting its said decision against the said second point, which said petition was denied. See folio 78 to 89. The cause having been remanded accordingly, defendant in error moved the trial court for an amendment of its findings of fact and conclusions of law, in accordance with the directions of the said Appellate Court. See folio 101, etc.

The plaintiffs in error moved said court for leave to serve and file a supplemental answer, setting forth said same matter of an alleged election by defendant in error to stand for the foreclosure of the original mortgages only, and certain other matters. See folios 91 to 99 inclusive.

Said motion was denied by the trial court, folio 100. From this decision the plaintiffs in error appealed to the Supreme Court of the State, assigning as error that he had not been permitted to file his supplementary answer, (see Assignments of Error 1, 2 and 3, folios 141 and 142); and also claiming again that the defendant in error had waived all right to foreclose his equitable mortgage. See Assignments of Error 5 and 6, folio 142. The appellants in error were overruled on every point. See decision of Supreme Court, folios 181 to 184. The court says "the identical question presented "by the proposed supplemental answer was presented and "argued to this court on the former appeal and decided ad- "versely to the appellants, and is therefore res adjudicata. "That decision became the law of the case and the "question cannot be re-considered on this appeal. "And besides the cause was remanded to the District Court "on the former appeal with directions to award judg-

"ment of foreclosure as to the equitable mortgage, and that "Court had no alternative but to "comply with that man- "date. But we may remark in passing, that the facts set "up in the proposed answer do not constitute a defense, "and, conceding authority in the court below to permit "it to be interposed, the order rejecting it was proper "for that reason. The doctrine of election of remedies has "no application to the facts of this case. Plaintiff did not "possess two inconsistent remedies for the enforcement of "his rights. He possessed an incumbrance against defend- "ants' property to the amount of $20,400.00 or more, with "but one remedy to enfore the security, which was by fore- "closure of the incumbrance, whether evidenced by the "original mortgages or by the substituted equitable mortgage. "He did not waive his rights under the equitable mortgage by "asking in his complaint—which set out all the facts, both with "the reference to the original and equitable mortgage—that "the original mortgages be foreclosed."

The claim of the plaintiffs in error, reduced to a single proposition is that the court erred in not entirely wiping out an undisputed indebtedness of more than $23,000.00, and giving to the debtor (plaintiffs in error,) a title to the lands in question, free from all liens. There is no controversy about the facts in this case, and has been none from the first. See opinion Supreme Court, folio 181.

ARGUMENT.

I.

The record in this case presents no federal question to be reviewed by this court and hence this court has no jurisdiction.

Assignments of error (1), (2) and (3) of the plaintiffs in error, (folio 201 of the transcript of record,) are mere objections to the ruling of the trial state court on matters of practice. The case had been tried upon the merits and taken

upon appeal from the judgment rendered upon such trial to the State Supreme Court. Plaintiffs in error had contended both in the trial court and in the supreme court that defendant in error by contending that the contract of February 19th, 1895, did not, by merger, extinguish the former mortgages, was estopped from asking a foreclosure of said contract as an equitable mortgage in case his contention against the merger should not be sustained. Upon this point plaintiffs in error were defeated in the State Supreme Court upon that appeal, and that court remanded the cause with specific instructions to the trial court to ascertain the amount due upon said contract as an equitable mortgage (a mere matter of computation by the trial court, since there was no dispute upon the facts) amend its conclusions of law to conform to the decision of the Supreme Court and proceed to judgment of foreclosure of said contract as an equitable mortgage for the amount so found to be due thereon. Thereupon plaintiffs in error petitioned said state Supreme Court for a modification of its said decision by striking out its said decision and specific direction to the trial court, or for a rehearing upon that point, fully urging and arguing their contentions in that matter, and were again overruled by that court. (Folios 78 to 89, inclusive.) Thereupon judgment was entered in the State Supreme Court which finally determined the entire controversy between the parties and the cause was remanded with such specific directions for final judgment by the trial court foreclosing the "equitable mortgage." When the cause came again into the trial court for the action thus specifically directed by the State Supreme Court, appellants made application for the first time for leave to set up said same matter claimed by them to furnish ground of estoppel of defendant in error to claim the foreclosure of the equitable mortgage and a waiver by him of the lien thereof, in and by his so-called supplemental answer (folios 91 to 98 inclusive.) This application was resisted and was denied by the trial court (folios 98 to 100 inclusive.)

Application having been made to the trial court by said defendant in error for the amendment of its findings in accordance with the said judgment of the State Supreme Court and directing entry of judgment of foreclosure of said equitable mortgage, which application came before the trial court for determination at the December term thereof on the 6th of December, 1898, the plaintiffs in error offered in evidence before the trial court certain records in alleged substantiation of the allegations of their said proposed supplemental answer which had been so rejected, which offers were objected to and were excluded by the trial court. (Folios 111 to 133 inclusive). This action of the trial court denying the application to file said supplemental answer and rejecting said offers of evidence to sustain the same is what is presented to this court as error by said assignments numbers (1), (2) and (3.)

It must be manifest that the trial court was right because (1), it must be apparent upon inspection that the proposed supplemental answers (folios 96 to 98) does not state any defense whatever; (2), that there is no supplemental matter set out therein; (3), that if it had presented a valid defense plaintiffs in error were too late in making application to file the same, having first submitted the same defense there sought to be interposed, and urged the same ground upon the trial of the cause in the *nisi prius* court, set it out in their settled case for the purpose of appeal to the Supreme Court (folios 17 and 18), tried it again before the Supreme Court of the State where they were defeated and moved there for a rehearing thereon and were again defeated; (4), the case having been thus remanded with specific directions that the trial court proceed to judgment as directed by the Supreme Court and not for a new trial, the trial court had no power to permit the filing of the so-called supplemental answer or to hear evidence to sustain the same.

That the trial court was right in these rulings was distinctly decided by the state Supreme Court on the second ap-

peal to that court by the plaintiffs in error. (Folios 181 to 183 inclusive.)

It is manifest that by the assignments of error in this court numbered from (1) to (8), (folios 201 and 202,) plaintiffs in error are merely calling in question the soundness of the decisions of said state courts upon those questions of general law which clearly present no federal question whatever.

By the 9th, 10th and 11th assignments of error the plaintiffs in error attempt to raise and to point out in the record as federal questions the claims that by such denial of their application to file said supplemental answer and make proofs thereunder they were denied a hearing thereon in the State court, and that therefore they were being deprived of their property without due process of law, and were also denied the equal protection of the laws. In this manner only is there even sought to be pointed out in this record any federal question whatever.

Now we remark:

1st. That plaintiffs in error are wholly mistaken in their assertion as a matter of fact that they were deprived of a hearing upon that question. They were accorded a full hearing upon all the questions attempted to be presented by that proposed supplemental answer, both upon the initial trial of the cause, upon the trial of the first appeal to the Supreme Court of the State and the application for a rehearing thereon in that court; so that they had their day in court upon all those questions. They were again heard upon the application itself to file the proposed supplemental answer and the application was denied upon a full and fair hearing, and rightfully denied. They were again heard upon that same application, and also upon the questions sought to be presented thereby, on the second appeal to the State Supreme Court. The questions thus passed upon, and upon which the plaintiffs in error were thus fully heard, were in no sense federal questions.

The mere assertion by plaintiffs in error, as set forth

first in their proposed supplemental answer, and as now asserted in their 9th, 10th and 11th assignments of error, that, by a refusal of the court to allow said supplemental answer and to permit them to retry those questions thereunder, they were deprived of their property without due process of law or were denied the equal protection of the laws, does not in any manner present a federal question to this court in fact. The mere averment of the existence of a federal question, or the simple averment that a party is deprived of his property without due process of law, or is denied the equal protection of the laws, is not in all cases sufficient. This court has no jurisdiction of a writ of error to review the judgments of State courts unless a real, and not a fictitious, federal questions is involved.

Hamblin v. Western Land Co., 147 U. S. 531.

As was said by this court in the case of the City of New Orleans v. New Orleans Waterworks Co., 142 U. S. 79, 87, "The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

See also Millingar v. Hartupee, 6 Wall 258.

Plaintiffs in error in their proposed supplemental answer allege that, at the beginning of the trial of the action, they in open court offered to allow judgment to be taken foreclosing the said equitable mortgage for the amount due thereon, which offer was declined; all of which facts appeared fully in the record and were fully considered at the said trial, were a part of the record and fully considered at the hearing on the appeal to the Supreme Court, were urged by plaintiffs in error as grounds to defeat defendant in error from obtaining

judgment of such foreclosure, and their contention thereon was after full hearing overruled by the Supreme Court. Plaintiffs in error further allege in said supplemental answer that any judgment in favor of defendant in error foreclosing the lien for any sum whatever would abridge the privileges and immunities of plaintiffs in error and would deprive them of property without due process of law and deny to them the equal protection of the laws. But we submit that this allegation is a mere statement of a proposed proposition of law and not of any fact, supplementary or otherwise, and we further submit that as a proposition of law it is not true in fact. They further allege in this supplemental answer, in paragraph 3, that the defendant in error has waived the lien of the equitable mortgage and precluded himself from attempting to enforce the same and from seeking any foreclosure thereof. But we submit that this is a mere statement of a conclusion of law and not of any fact, and that it is intended for what would be a mere reiteration of the claim set up in the other allegation, that on the trial defendant had declined the offer of plaintiffs in error of judgment of such foreclosure. In this supplemental answer plaintiffs in error further make certain allegations by way of enlargement upon the allegations contained in the original answer in its third sub-division (folios 15 and 16) and also in the second sub-division of the reply to said original answer (folios 16 and 17). But we submit that none of these allegations presents any supplemental allegations whatever nor any matters of defense whatever. The same action and the proceedings therein were set forth in the original answer by way of a plea in abatement of a former action pending; but that plea was abandoned at the trial, or at least was in no manner urged (folios 17 to 20); and there certainly can be no reasonable grounds upon which plaintiffs in error could have been allowed to have again set them up for that or for any other purpose after the issues had been determined upon their merits and final judgment ordered by the Supreme Court of the State.

It was therefore right and proper upon these considerations alone that the application to file said supplemental answer was denied, and it is not true that the plaintiffs in error were on that account deprived of property without due process of law or denied the equal protection of the laws. The supposed federal question therefore thus averred by plaintiffs in error is not a real but a fictitious federal question.

2nd. The judgment of the State Supreme Court, a review of which is sought by means of the writ of error herein, did not in any manner determine any federal question whatever, nor was the determination of any federal question necessarily involved therein.

We call the attention of the court to the decision of the State Supreme Court itself (folios 181 to 184). The substance of that decision is, first, that the identical question presented by the proposed supplemental answer was presented, argued and determined in the first appeal to that court and was therefore res adjudicata; second, that the cause was remanded on the former appeal with specific directions to award judgment of foreclosure of the equitable mortgage, and that therefore the trial court had no alternative but to comply with the mandate, and could not allow the supplemental answer and proceed to another trial; and third, that that court, considering again the contentions of plaintiffs in error respecting the alleged estoppel of defendant in error by an election as between inconsistent remedies, decided as a proposition of general law that the doctrine of election of remedies has no application to the facts of the case, and that defendant in error had not waived his rights under the equitable mortgage by his contention for a foreclosure of the lien of the original mortgages. Now even supposing it could be contended that the Supreme Court determined against them, the alleged federal question sought to be raised by plaintiffs in error, it is clear that that judgment was not based upon such adverse determination of such federal question and that

a decision thereof was not necessary to the determination of the cause.

The rule is settled that to give this court jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary for the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

DeSausure v. Gaillard, 127 U. S. 216.
Johnson v. Risk, 137 U. S. 300.
Cook County v. Calumet & C. Canal & Dock Co., 138 U. S. 635.
Haley v. Breeze, 144 U. S. 130.

3rd. Even the averment of the alleged federal question in this cause was made entirely too late. This court will not consider such question, nor entertain jurisdiction of the writ of error to the State Court to review its decisions unless the federal question was distinctly raised and presented to that court *in due time*, so that it shall be regularly and properly passed upon by it, in the due progress of the proceedings. In this cause plaintiffs did not in any manner present or aver the question of their being deprived of property without due process of law, or of their being denied equal protection of the laws, or any other form of federal question, until the cause had been fully determined on its merits, including the questions of estoppel, and waiver of the lien of the "equitable mortgage" and the right of defendant in error to a judgment of foreclosure thereof in this action, and was remanded to the trial court with specific instructions for entry of final judgment. As was rightly decided by the State Supreme court on the second appeal, the trial court had then no power to allow the filing of the supplemental answer, and could do

no otherwise than to obey the mandate of the appellate court. If the question thus attempted to be raised by plaintiffs in error could be held to be a real federal question it was entirely too late to then raise it.

Bushnell v. Crooke Mining & Smelting Co., 148 U. S. 682.
Loeber v. Schroeder, 149 U. S. 580.
Texas & P. Ry. Co. v. So. Pac. Ry. Co., 137 U. S. 48.
Sayward v. Denny, 158 U. S. 180.

II.

If the court should hold that it had jurisdiction or color of jurisdiction of the writ of error in this cause defendants in error are entitled to an affirmance of the judgment of the court below under Rule 6 of this court. Defendant in error under Section 5 of Rule 6 has united with the motion to dismiss, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ of error was taken for delay only; and also that the question on which the jurisdiction depends is so frivolous as not to need further argument.

1st. We think this record shows clearly that the plaintiffs in error have taken this writ of error for the mere purpose of delay. All the questions under dispute by the parties, and especially the question, so tenaciously disputed by these plaintiffs in error, as to whether defendant in error was precluded by estoppel or otherwise from claiming a foreclosure of the equitable mortgage, were fully and fairly considered and determined in the trial court and in the State Supreme Court upon the first appeal, no federal question being then in any manner before the court.

The State Supreme Court having rendered its decision specifically directing the trial court to render judgment for

foreclosure of the equitable mortgage, plaintiffs in error first exhibit their desire to delay in their petition for a rehearing (folios 87, 88), where they use this language, addressed to the Supreme Court of the State, to-wit: "I think it proper for me to state, in presenting this motion, that I greatly prefer not to present or press this matter. But since the portion of the order here objected to will in all probability prevent any just settlement of the matter between the parties, unless at very great sacrifice, and since I feel confident that if that be stricken out and the matter left for future consideration, such settlement will be readily made, whereby each party will receive his moral dues and there will remain no occasion for any further consideration by the court, I have decided to present the matter."

Now what other consideration or expectation could have been in the minds of plaintiffs in error when penning this language in a petition addressed to the State Court praying that there be stricken out of its decision the determination that defendant was entitled to judgment of foreclosure of the equitable mortgage in this action and the specific direction to the trial court to that end, except that he might thereby prolong the litigation to the discouragement of the defendant in error and thereby secure an advantageous settlement of the case.

Failing in that and the case having been remanded for the amendment of the findings of the trial court and the entry of final judgment, plaintiffs in error next make application to the trial court for leave to file a supplemental answer which clearly presents no defense whatever and seeks only to relitigate the same questions which had already been determined upon full hearing: questions which had become res adjudicata as between the parties in this very suit. We think it clear that there could have been no purpose in making that application except the purpose to prolong the litigation and delay the result.

Evidently expecting to fail in that application plaintiffs in error make an averment in that supplemental answer that if it be not granted any judgment rendered against them would be treated as depriving them of property without due process of law and denying them equal rights as citizens under the laws:—evidently looking forward to a writ of error to the Supreme Court of the United States as a means of further delay and prolonging of the litigation.

Let it be remembered that this was an action to foreclose a lien for a considerable amount upon a large tract of land constituting an improved farm in the possession of the plaintiffs in error; and it would seem certain that so long as the litigation looking to such foreclosure could be prolonged plaintiffs would continue to reap the advantage of such possession and secure to themselves the rents and profits of the land. A case was therefore settled upon the application of plaintiffs in error making up a record not merely for the Supreme Court of the State, but presenting, as plaintiffs in error evidently considered, a record which would carry a federal question, under a writ of error, to the Supreme Court of the United States; and thus further prolong and delay the controversy. Being defeated in the State Supreme Court, and judgment having been entered in that court affirming the judgment of the trial court, which judgment of affirmance bears date December 15, 1899, plaintiffs in error deliberately wait until until the two years allowed in which to take a writ of error from this court to the State court to bring that judgment up for review, and then sue out the present writ of error.

From all this which appears in the record we think it manifest that this writ of error was taken for the purpose of delay only.

2nd. We further contend that in the present cause the question on which the jurisdiction of this court depends, (if such jurisdiction exists), is so frivolous as not to need further

argument, and that such question was rightly decided in the State Court, and that therefore it is unnecessary to keep the case in this court for further argument.

Spies v. Illinois, 123 U. S. 131.
Church v. Kelsey, 121 U. S. 282.
Arrowsmith v. Harmoning, 118 U. S. 194.

Dated February 10th, 1903.

Respectfully submitted,

F. B. KELLOGG, ROBERT TAYLOR,
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DEFENDANT'S BRIEF

In the Supreme Court of the United States.

No. 225.—October Term; 1902.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

Against

DANIEL S. PIPER, Defendant in Error.

BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT.

This is an action begun and prosecuted to final jndgment in the state courts of the state of Minnesota for the foreclosure of mortgage lien or liens owned and held by said defendant in error (who was plaintiff in the cause in the State court) upon about 790 acres of land of said plaintiffs in error, (who, with one L. C. Woodman, were defendants in that court.)

On February 19, 1895, said defendant in error was the owner and holder of three separate mortgages and the debts secured thereby, all given by plaintiffs in error upon said lands and all past due, to-wit: the Woodman debt and mortgage of April 1, 1892; the Deats debt and mortgage of November 1. 1893, and the Piper debt and mortgage of January 23, 1894; aggregating something more than $17,000. And there was also standing against the land another and prior debt and mortgage of $5,000 and considerable past due interest, the principal of which was not then due, given also by plain-

tiffs in error, designated as the Willis mortgage in the record, and dated July 21, 1890, and payable in five years after its said date. (See Transcrips of Record, folios 1 to 8, 14, 15, 18, 19, 20, 27, 28, 29.)

On said February 19, 1895, said plaintiffs in error, as parties of the first part, the defendant in error as party of the second part and said L. C. Woodman as party of the third part made and entered into the written agreement of that date set forth in the Record on pages 5 and 6, in folios 9, 10 and 11, the essential provisions of which are as follows: That defendant in error should, and he did, pay and take assignment to himself of all other mortgages on said land (i. e. of the said Willis mortgage, which was the only other one existing) (folio 3, page 2, folio 8, page 4, and folios 18, 19, 31); that plaintiffs in error should convey all said lands by deed to defendant in error (which was done, folio 8, page 5, folio 20, page 11, folios 22 and 23, page 12, and folio 29, page 16); that plaintiffs in in error should pay defendant in error thereafter "the full sum of one hundred dollars per 20 "month payable on or before the last day of February, A. D. "1895, and on or before the last day of each and every month "thereafter continuously." * * * That defendant in error execute and place in escrow in the hands of said Woodman as depository a warranty deed of said lands running to plaintiffs in error, "to be held in escrow by said Woodman "until said party of the first part" (plaintiffs in error) "shall "have paid to said party of the second part all said monthly "payments above stated and also the sum of twenty thousand "and four hundred dollars ($20,400) said payment of said "principal sum to be made at such time or times as may be 30 "determined by said parties of the first part, they having the "privilege of paying any sum not less than fifty dollars at any "time thereon: It being agreed and understood that said "parties of the first part shall become entitled to the de- "livery to them or their assigns of said deed held by said "third party in escrow as above, at any time whatever pro-

"vided only that they continuously pay said $100 monthly "and also pay said sum of $20,400 in time and manner as "above; and it is further provided that said monthly pay- "ments shall be diminished from and after any payment upon "said $20,400 in the same proportion which the sum or sums "paid thereon bear to said total sum of $20,400. Provided, "further, that upon failure by said party of the first part to "pay said monthly payments, all their rights hereunder shall "cease and determine." Some minor provisions of the said "contract (which is set out in full in the Record at folios 9, 10 10, 11) are omitted in the above statement thereof, they having no bearing on the questions to be considered. The "escrow deed" was executed and deposited with said Wood- man who accepted it and held it as such depository. (Folio 11, last part, and folio 30, first part.)

Plaintiffs in error made such monthly payments for eleven consecutive months, till December 31, 1895, and then de- faulted, and never afterward paid anything. Nothing what- ever was paid on the principal. (Folios 12, 14 and 31.)

The complaint sets forth all the facts, all of said debts, 20 notes and mortgages, deeds and contracts, and said entire transaction of February 19, 1895, the assignments of the mortgages, and all the facts in full including the said default, alleges insolvency on the part of plaintiffs in error and that the value of all said lands is less than the amount due in said matter to defendant in error. The prayer is for judgment determining the amount due thereon and for a strict fore- closure of said contract and all said mortgages, unless redemp- tion be made within one year after entry of such judgment by payment of the amount so adjudged to be due; and that said 30 escrow deed be then cancelled; or, in case the court deem it inequitable to so adjudge a "strict foreclosure," that said con- tract and all said mortgages be, by and under the judgment of the court foreclosed, by sale of said mortgaged premises to satisfy the amount so adjudged to be due; and for such other

and further relief as to the court may seem just and equitable. (Folio 13.)

The record of the trial in the *nisi prius* court is found on pages 10 and 11 (folios 17 to 20 of the Transcript of Record herein). There was no dispute as to the facts: The contention between the parties being only upon the question of what is the proper construction and legal effect of said agreement and transaction of February 19, 1895. Plaintiffs in error contended that it constituted a new and independent, equitable mortgage for the new principal sum of $20,400 and said monthly payments of $100, and that it extinguished entirely by merger all the four original mortgages and the debts secured thereby, while defendant in error contended that it was but a provisional modification of those original securities, waiving the default already made in their terms and saving plaintiffs in error from all default therein so long as they should continuously make the said monthly payments of $100, and giving them an option to pay upon the principal sums, at any time or times and in any sums not less than $50, as might be determined by themselves, and thereby become entitled, upon such payment of said sum of $20,400 and the continuous payment monthly till then of said additional instalments of $100, to a delivery to them of said escrow deed of warranty, which should thereupon, as a matter of course, clear the land in them from all such incumbrances held by defendant in error; that it did not create a new debt of $20,400 payable at all events, or enforcible at any time against plaintiffs in error, either as a personal claim or as an enforcible lien upon the land, but payable only at the option of plaintiffs in error; that so long as they faithfully kept up such monthly instalment payments, their said option continued good by the terms of the contract, but that by its express terms when they made default in such monthly payments all their rights under said contract ceased and determined, so that a cause of action for the enforcement of the original mortgages and mortgage debts according to the terms thereof

arose, because of such default, just as if said contract had never been made, they having credit only for the sums actually paid during such intervening time; that such continuous payment of $100 each month would prevent the arising of any cause of action on said original mortgages and of course would prevent the running of the statute of limitations because no cause of action could arise, against which such limitation could run. Plaintiffs in error on the other hand urged, as an argument in support of their contention for the extinguishment of the original securities by merger, that, otherwise, plaintiffs in error could by the continuous payments of the monthly instalments prevent the enforcement of the original debts and securities until they should be barred by the running of the statute of limitation. (Folios 18 to 20 inclusive.)

Defendant in error further contended that while he claimed that the contract and transaction of February 19, 1895, did not extinguish by merger the original mortgages and mortgage debts, he was entitled in case the court should determine otherwise, to a judgment of foreclosure in this action, of the said contract and transaction of February 19, 1895, as an equitable mortgage against the lands for the amount found due thereon. This is disclosed by the brief of plaintiffs in error at folio 67 on page 36.

At the opening of the trial plaintiffs in error offered to allow the defendant in error to take a decree of foreclosure in this action, based upon and for the amount provided in said contract or agreement, which offer was declined by the counsel of defendant in error. This offer and declination was made part of the record by settlement of a case to go to the Supreme Court of the State. (See page 10 in folio 17.) The trial court sustained the contention of the defendant in error, holding that said original mortgages were not extinguished by said contract of February 19, 1895, and rendered judgment accordingly. (Folios 32 and 33.)

The plaintiffs in error thereupon moved the trial court for an amendment of its findings of fact and conclusions of

law, as set out in pages 19 and 20 of the transcript of record, seeking among other things for a determination by the court, as conclusions of law:

First, that said original mortgages were extinguished by merger in said contract as an equitable mortgage, (see paragraphs 1 and 2 in folio 36) and that defendant in error had elected at the opening of the trial not to accept said offer for the foreclosure of said contract as an equitable mortgage, and was therefore not entitled to any relief in this action, (see sub-division 3 in folio 36) and that the plaintiffs in error were entitled to a judgment that the action be dismissed, (see sub-division 4 in folio 37] which motion did not prevail. Plaintiffs in error having appealed the cause to the State Supreme Court, they again argued in that court, first, that said original mortgages were so extinguished by merger, (see folios 52 to 62 inclusive), and second, that defendant in error was not entitled to a foreclosure in any event of said equitable mortgage, on the ground that he was bound and estopped by an election to stand for the foreclosure of the original mortgages only, by his said refusal to accept the offer of such foreclosure on the trial. (See folios 62 to 64 inclusive, and folios 67 to 70 inclusive.)

The first of these contentions was decided by the State Supreme Court in favor of the plaintiffs in error, said court holding that said original mortgages were extinguished by merger, but their said second contention was overruled by the Supreme Court of the State, which held the defendant in error was entitled to a foreclosure of the said contract and transaction of February 19, 1895, as an equitable mortgage for the amount due, according to its terms, and that court reversed the judgment of the court below and remanded the cause to the trial court, with express directions that that court proceed to determine the amount due upon said equitable mortgage, amend its findings of fact to correspond, and also amend its conclusions of law in accordance with the views of the appellate court. (See folios 105 to 110.)

Thereon the plaintiffs in error petitioned the appellate court for a rehearing and for a modification of its decision, by

omitting its said decision against the said second point, which said petition was denied. (See folios 78 to 89.) The cause having been remanded accordingly, defendant in error moved the trial court for an amendment of its findings of fact and conclusions of law, in accordance with the directions of the said appellate court. (See folios 101, etc.)

The plaintiffs in error moved said court for leave to serve and file a supplemental answer, setting forth said same matter of an alleged election by defendant in error to stand for the foreclosure of the original mortgages only, and certain other matters. (See folios 91 to 99 inclusive.)

Said motion was denied by the trial court, (folio 100). From this decision the plaintiffs in error appealed to the Supreme Court of the State, assigning as error that he had not been permitted to file his supplementary answer, (see Assignments of Error 1, 2 and 3, folios 141 and 142), and also claiming again that the defendant in error had waived all right to foreclose his equitable mortgage. (See Assignments of Error 5 and 6, folio 142.) The appellants in error were overruled on every point. (See decision of Supreme Court, folios 181 to 184.) The court says "the identical question presented by "the proposed supplemental answer was presented and argued "to this court on the former appeal and decided adversely to "the appellants, and is therefore *res adjudicata*. That decision "became the law of the case and the question cannot be re-"considered on this appeal. And besides, the cause was "remanded to the district court on the former appeal with "directions to award judgment of foreclosure as to the equita-"ble mortgage, and that court had no alternative but to com-"ply with that mandate. But we may remark in passing, that "the facts set up in the proposed answer do not constitute a "defense, and, conceding authority in the court below to per-"mit it to be interposed, the order rejecting it was proper for "that reason. The doctrine of election of remedies has no "application to the facts of this case. Plaintiff did not possess "two inconsistent remedies for the enforcement of his rights. "He possessed an incumbrance against defendant's property "to the amount of $20,400.00 or more, with but one remedy

"to enforce the security, which was by foreclosure of the in-
"cumbrance, whether evidenced by the original mortgages or
"by the substituted equitable mortgage. He did not waive
"his rights under the equitable mortgage by asking in his
"complaint—which set out all the facts, both with refer-
"ence to the original and equitable mortgage—that the origi-
"nal mortgages be foreclosed."

The claim of the plaintiffs in error, reduced to a single proposition, is that the court erred in not entirely wiping out an undisputed indebtedness of more than $23,000.00, and giving to the debtor, (plaintiffs in error), a title to the lands in question, free from all liens. There is no controversy about the facts in this case, and has been none from the first. (See opinion Supreme Court, folio 181.)

At the time of our making this brief we have not seen the brief of the plaintiffs in error, nor their statement of the case; hence we make the foregoing statement thereof on behalf of defendant in error.

ARGUMENT.

Defendant in error has already made and submitted motions to dismiss the writ of error, for want of jurisdiction of this court, because the Record presents no federal question, and to affirm, in case the court shall deem that it has jurisdiction, on the grounds that, although the record may show such jurisdiction, it is manifest that the writ of error was taken for delay only, and also that it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument; and have submitted our Brief of Argument upon said motions.

Being informed that this cause is likely to be reached by the court, very soon in its regular order, on the merits, and that the court may therefore postpone the hearing and consideration of said motions till the hearing on the merits, we

beg leave here to repeat, in few words, the points presented in that Brief so made and submitted upon the said motions to dismiss and to affirm.

I.

The record presents no federal question to be reviewed by this court, and hence this court has no jurisdiction.

As we have stated, there is no dispute at all upon the facts. In all the courts, there have been only two questions of law up for determination, both clearly presented by the pleadings, as has been held by the State courts, to-wit: First, Are the four original mortgages given by the plaintiffs in error and held by defendant in error (described at folios 1 to 8 inclusive) extinguished by merger into the subsequent agreement and transaction of February 19th, 1895, (set forth in folios 8 to 12 inclusive), leaving the latter to stand as an equitable mortgage, the only lien to be enforced by foreclosure; and, second, if so, is the defendant entitled to a judgment foreclosing the lien of such substituted equitable mortgage, in this action, in view of the fact that on the trial plaintiffs in error offered to allow defendant in error to take such judgment of foreclosure of such equitable mortgage, which offer defendant in error declined, he contending that such merger was not affected by the said transaction and contract, and that he was entitled to a judgment of foreclosure for the larger amount secured by the said four original mortgages.

The first of these questions, although decided by the trial court in favor of the contention of defendant in error, was upon the first appeal to the State Supreme Court, decided in accordance with the contention of plaintiffs in error, and was thus eliminated from the case.

The plaintiffs in error, upon the said second question, contended that defendant in error had, by his unsuccessful contention against such merger of the original mortgages and

his refusal upon the trial to accept their offer of judgment for foreclosure of the equitable mortgage, waived and lost his lien under the equitable mortgage, and his right to a foreclosure thereof. This point was clearly raised by plaintiffs in error themselves, was fully urged, argued and submitted to the State court, being distinctly set forth in the Record in that court, and was decided by the State Supreme Court in its judgment and decision on the 15th day of August, 1898, more than three years prior to the application of plaintiffs in error for the writ of error herein, which judgment and decision of said State Supreme Court was adverse to such contention of plaintiffs in error, and was final, in that it determined the cause on the merits, and, while it reversed the judgment of the trial court directing foreclosure for the amount secured by the said four original mortgages, it remanded the cause with specific directions to the trial court to find (compute) the amount due on the said equitable mortgage and proceed to judgment for its foreclosure. No new trial or retrial was granted, and nothing remained to be done, or could be done, except to ascertain the amount due upon the equitable mortgage, a mere matter of computation, all the facts being undisputed, and to proceed to foreclose therefor. Plaintiffs petitioned the State Supreme Court for a re-hearing upon this same question which was denied. The cause having been remanded with such specific directions, plaintiffs moved the trial court for leave to set up again by supplemental answer the same matters so already in the Record and so tried and determined, and sought to retry the same question; despite the former adjudication thereof, asserting in his proposed supplemental answer that any judgment in favor of defendant in error, foreclosing said lien for any sum whatever would abridge the privileges and immunities of plaintiffs in error, as citizens of the United States, and would deprive them of property without due process of law, and would deny them the equal protection of the laws. (Folio 97).

It is only in this manner, and by this proposed "supple-

mental" answer that plaintiffs seek to raise and carry into this record a federal question for review.

Their motion being denied, as also their offer of certain evidence as if to prove the allegations of such supplemental answer, and judgment having been entered according to the said specific direction of the State Supreme Court, a second appeal was taken by plaintiffs to that court, on which appeal the same question was again vigorously urged and argued by plaintiffs in error, notwithstanding the former adjudication thereof, to-wit, the question whether defendant in error, by his refusal to accept their said offer of judgment foreclosing the lien of said equitable mortgage, made at the opening of the original trial, (folio 17, at top of page 10), and by contending for a foreclosure for the larger sum secured by the four original mortgages, did thereby waive and lose his lien under the equitable mortgage.

The Supreme Court of the State, after giving full hearing to all their arguments and contentions, decided against them, holding that the question had been fully submitted, heard, and decided against them on the first appeal, and was *res adjudicata*, and that the trial court was right in its overruling of their motion for leave to file their proposed supplemental answer, etc., both because the trial court could not do otherwise than to obey the specific instructions of the appellate court, and because the proposed supplemental answer did not set forth any defense. Judgment was rendered affirming the judgment of the trial court. Thereupon, almost two years after the entry of this judgment of affirmance, plaintiffs in error sued out this writ of error.

Now, we submit, that this record presents no federal question at all. Plaintiffs in error are wholly mistaken in their contention that they were deprived of a hearing upon this question. We think this so manifest from the entire record, as to require no argument. (See, in the record of the trial, folio 17 on page 10 of the Transcript of Recod, in the motion of plaintiffs in error for amended findings of law

and fact, subdivisions III and IV, on page 20; in the brief of plaintiffs in error on appeal to the State Supreme Court, subdivision VIII, page 30, folio 54; subdivision II of their brief on page 34, *et seq.;* in their Reply Brief, subdivision I, folios 67, *et seq.*, pp. 36, 37; in the decision of the State Supreme Court on the first appeal, last part of folio 104, et seq., and folio 110; in the petition of plaintiffs in error for a re-hearing upon that first appeal, folios 78 to 89, inclusive, pp. 42 to 49; in folios 90 to 100 inclusive; in brief of plaintiffs in error. on second appeal, folios 141 to 154 inclusive; in their Reply Brief on said second appeal, folios 155 to 180 inclusive; and in the decision of the State Supreme Court, on the second appeal, folios 181 to 185, inclusive).

This record does not present any real federal question. The matters of which plaintiffs in error complain are only decisions of the State courts upon general questions of law, and of pleadings and practice, in those courts.

The mere averment by plaintiffs in error of a federal question does not necessarily present an actual federal question for the consideration of the court.

Millinger vs. Hartupee, 6 Wall. 258.
City of New Orleans vs. New Orleans Waterworks Co., 142 U. S. 79, 87.
Hamblin vs. Western Land Co., 147 U. S. 531.

This court said, in the above case of New Orleans vs. Waterworks Co.. "The bare averment of a federal question "is not in all cases sufficient. It must not be wholly without "foundation. There must be at least color of ground for such "averment, otherwise a federal question might be set up in "almost any case, and the jurisdiction of this court invoked "simply for the purpose of delay."

Again, the judgment of the State Court, in this case does not purport to determine any federal question, nor was the determination of any federal question necessarily involved therein.

The rule is well settled that, to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary for the determination of the cause and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

LeSausure v. Gaillard, 127 U. S. 216.
Johnson v. Risk, 137 U. S. 300.
Cook County v. Calumet & C. Canal & Dock Co., 138 U. S. 635.
Haley v. Breeze, 144 U. S. 130.

Now, we here call attention to the decision of the State court, sought to be brought up for review by means of this writ of error. (Folios 181 to 184). Briefly stated that decision is: 1st; That the identical question presented by the proposed supplemental answer of plaintiffs in error was presented, argued and determined in the first appeal to that court and became *res adjudicata;* the law of the case. 2nd; that upon the said first appeal the cause was remanded to the trial court with specific directions to award judgment of foreclosure of the said equitable mortgage; that therefore the trial court had no alternative but to comply with the mandate, and could not allow the interposition of the so-called supplementary answer, and proceed to a second trial; and 3rd; that, considering again the contentions of plaintiffs in error upon the point under dispute, their proposed supplemental answer did not set forth any defence, that the doctrine of election as between inconsistent remedies has no application to the facts of this case, and that defendant in error did not waive his rights under the equitable mortgage by contending that the liens of the original mortgages were not extinguished by merger in the equitable mortgage. (Folios 181 to 183 inclusive). Now, in all this there is not a suggestion of any federal question. The judgment was not based upon any federal

question, nor was the decision of any federal question necessary to the determination of the cause.

Again, even the averment of an alleged federal question, made for the first time after the cause was determined on its merits, the only question remaining in the case finally determined and become *res adjudicata*, and the cause remanded to the trial court, with specific directions for entry of final judgment, came entirely too late.

At that stage of the proceedings the State court had no power to award another trial of the question under dispute; there was no dispnte at all upon the facts of the case; and none was sought to be raised; nor was a new trial asked for as a ground for interposing a supplemental answer of any kind; the court had no power to grant the application for leave to interpose the proposed supplemental answer, nor to admit evidence under the same, even if it had set forth any defense, or any issue not already determined and become *res adjudicata*. It was then too late to present or aver a federal question, for the state court had then no power to do anything except to render judgment as directed by the highest appellate court of the State having jurisdiction.

Bushnell v. Crooke Mining, &c., Co., 148 U. S. 682.
Loeber v. Schroeder, 149 U. S. 580.
Texas & P. Ry. Co. v. So. Pac. Ry. Co., 137 U. S. 48.
Sayward v. Denny, 158 U. S. 180.

II

If the court should hold that it had jurisdiction or color of jurisdiction of the writ of error in this cause defendants in error are entitled to an affirmance of the judgment of the court below under Rule 6 of this court. Defendant in error unner Section 5 of Rule 6 has united with the motion to dismiss, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest

the writ of error was taken for delay only; and also that the question on which the Jurisdiction depends is so frivolous as not to need further argument.

1st. We think this record shows clearly that the plaintiffs in error have taken this writ of error for the mere purpose of delay. All the questions under dispute by the parties, and especially the question so tenaciously disputed by these plaintiffs in error, as to whether defendant in error was precluded by estoppel or otherwise from claiming a foreclosure of the equitable mortgage, were fully and fairly considered and determined in the trial court and in the State Supreme Court upon the first appeal, no federal question being then in any manner before the court.

The State Supreme Court having rendered its decision specifically directing the trial court to render judgment for foreclosure of the equitable mortgage, plaintiffs in error first exhibit their desire to delay in their petition for a rehearing (folios 87, 88), where they use this language, addressed to the Supreme Court of the State, to-wit: "I think it proper for me to state, in presenting this motion, that I greatly prefer not to present or press this matter. But since the portion of the order here objected to will in all probability prevent any just settlement of the matter between the parties, unless at very great sacrifice, and since I feel confident that if that be stricken out and the matter left for future consideration, such settlement will be readily made, whereby each party will receive his moral dues and there will remain no occasion for any further consideration by the court, I have decided to present the matter."

Now what other consideration or expectation could have been in the minds of plaintiffs in error when penning this language in a petition addressed to the State Court praying that there be stricken out of its decision the determination that defendant was entitled to judgment of foreclosure of the equitable mortgage in this action and the specific direction to the trial court to that end, except that he might thereby prolong the litigation to the discouragement of the defendant in error and thereby secure an advantageous settlement of the case.

Failing in that and the case having been remanded for the amendment of the findings of the trial court and the entry of final judgment, plaintiffs in error next make application to the trial court for leave to file a supplemental answer which clearly presents no defense whatever and seeks only to relitigate the same questions which had already been determined upon full hearing: questions which had become *res adjudicata* as between the parties in this very suit. We think it clear that there could have been no purpose in making that application except the purpose to prolong the litigation and delay the result.

Evidently expecting to fail in that application, plaintiffs in error make an averment in that supplemental answer that, if it be not granted, any judgment rendered against them would be treated as depriving them of property without due process of law and denying them equal rights as citizens under the laws:—evidently looking forward to a writ of error to the Supreme Court of the United States as a means of further delay and prolonging of the litigation.

Let it be remembered that this was an action to foreclose a lien for a considerable amount upon a large tract of land constituting an improved farm in the possession of the plaintiffs in error; and it would seem certain that, so long as the litigation looking to such foreclosure could be prolonged, plaintiffs in error would continue to reap the advantage of such possession and secure to themselves the rents and profits of the land. A case was therefore settled upon their application, making up a record not merely for the Supreme Court of the State, but presenting, as plaintiffs in error evidently considered, a record which would carry a federal question, under a writ of error, to the Supreme Court of the United States; and thus further prolong and delay the controversy. Being defeated in the State Supreme Court, and judgment having been entered in that court affirming the judgment of the trial court, which judgment of affirmance bears date December 15, 1899, plaintiffs in error deliberately wait until near the expiration of the two years allowed in which to take out a writ of

error to bring that judgment up for review, and then sue out the present writ of error.

From all this which appears in the record we think it manifest that this writ of error was taken for the purpose of delay only.

2nd. We further contend that in the present cause the question on which the jurisdiction of this court depends, (if such jurisdiction exists), is so frivolous as not to need further argument, and that such question was rightly decided in the State Court, and that therefore it is unnecessary to keep the case in this court for further argument.

Spies v. Illinois, 123 U. S. 131.
Church v. Kelsey, 121 U. S. 282.
Arrowsmith v. Harmoning, 118 U. S. 194.

III.

Considering the decision of the State Supreme Court upon the merits, we confidently argue that its propositions of law are sound and in accordance with the well settled principles of jurisprudence.

The alleged errors assigned by plaintiffs in error may, we think, be condensed into the following:

(a). That it was error in the State Supreme Court, on the first appeal, to render judgment remanding the cause to the trial court with the specific directions given which disposed finally of the cause and in effect directed the entry of judgment of foreclosure of the equitable mortgage.

(b). That it was error for the trial court to obey those specific directions, deny their motion for the allowance of their supplemental answer, reject their offers of evidence thereunder, and proceed to determine the amount due upon the equitable mortgage and enter judgment for its foreclosure, as directed by the mandate of the appellate court.

(c). That it was error in the State Supreme Court, on the second appeal, to stand by its decision made on the first appeal, holding it to be right, and to have become "the law of

the case," making the whole matter *res adjudicata*, binding upon the parties and the court in all subsequent proceedings.

(d). Based upon these three complaints, plaintiffs make the averment that the proceedings in the state court did not constitute "due process of law," that thereby plaintiffs in error were deprived of their property without due process of law and were denied the equal protection of the laws.

1.

As to the decision and judgment of the State Supreme Court, on the first appeal, which we have said was a judicial determination of the whole case upon the merits, deciding the first question involved, (the question of merger of the four original mortgages into the contract and transaction of February 19, 1895, as a new, equitable mortgage), in favor of plaintiffs in error, and determining the remaining question, (that of estoppel of defendant in error to claim under the said equitable mortgage by reason of his contention against such merger), in favor of defendant in error; we call attention to the fact that said decision, judgment and remand with specific directions disposing of the whole case, was rendered on August 15th, 1898, more than three years prior to the suing out of the writ of error herein (Transcript of Record, folios 102 to 110); yet no appeal therefrom, nor writ of error for review thereof, has ever been taken, and it is not before this court for review. The writ of error herein and the petition therefor relate only to the judgment of the State Supreme Court rendered, on the second appeal to that court, on the 15th day of December, 1899. (Transcript of Record, folio 194, on page 107).

2.

The said judgment, decision and remand with such specific directions determining the whole case on the merits, rendered on August 15, 1898, was a direct adjudication upon the very question as to which plaintiffs in error have made their complaint throughout the entire litigation; the said question of estoppel of defendant in error to claim a lien under

the said equitable mortgage and a foreclosure of the same, after having contended against the alleged merger of the original mortgages. All the facts upon which such contention was made for such estoppel were of record and were undisputed, and the question itself was raised and urged by plaintiffs in error upon that record, on the first appeal. We here quote the exact words of that decision upon that question: "It is argued by defendants' counsel that in this action "plaintiff is not entitled to a foreclosure of this equitable "mortgage, the reason given being that he elected to institute "this proceeding for a foreclosure of the original mortgages "only, and expressly declined to accept the relief afforded by "a foreclosure of that found in the contract. As before "stated, the complaint is broad enough to have justified find-"ings upon which could have been predicated conclusions of "law in accordance with the views hereing expressed, and "ordering a foreclosure of the equitable mortgage for the sum "due on the contract, with proper costs of the proceeding; "and the findings of fact actually warrant such conclusions, "except that the sum due was not ascertained. No good "reason existed at the termination of the trial below, and "none now exists, why plaintiff should not be entitled to a "foreclosure in this action of this equitable mortgage on the "790 acres. The judgment appealed from is reversed and "set aside * * * . Upon the remanding of the "cause to the court below, it will proceed to determine the "amount due upon the equitable mortgage, amend its find-"ings of fact to correspond, and also amend its conclusions of "law in accordance with the views herein expressed." (Transcript of Record, folio 110; 73 Minn. 332; 76 N. W. 57.)

How can it be contended that this judgment and decision of the highest court of the State did not fully and finally determine that question?

Plaintiffs in error moved that appellate court for a rehearing upon that question alone, and in their petition for a rehearing elaborately and fully argued again their conten-

tions upon it, presenting numerous authorities which they deemed to support their arguments, which motion was denied. (Transcript of Record, folios 78 to 89, inclusive.)

How can it be claimed that plaintiffs in error did not have their day in court, and did not have a full hearing, upon this question of their own raising?

That decision became the "law of the case," upon that question, to be followed in all subsequent proceedings therein, and thereby this question became *res adjudicata*, as was rightly held by said State Supreme Court, on the second appeal. (Transcript of Record, folio 183. 78 Minn. 221; 80 N. W. 970.)

2 Enc. of Pl. & Pr. p. 375 et seq. and cases there cited.
Johnson v. Telephone Exchange Co., 54 Minn. 37.
Tilleny v. Wolverton, 54 Minn. 75.
Phelps v. Sargeant, 73 Minn. 260.
Union Nat. Bank v. Rich, 116 Mich. 414; 74 N. W. 659.
2 Enc. of Pl. & Pr. p. 378, and notes 1 and 2 and citations.
Ib. 379, and note 3 and citations.

As was rightly held by the State Supreme Court, on the second appeal (folio 183) the cause having been remanded to the trial court on the former appeal "with directions to award "judgment of foreclosure as to the equitable mortgage, that "court had no alternative but to comply with that mandate." "Where judgment is reversed with specific directions, the "court below has no discretion in the premises, but must "pursue the mandate of the appellate court." 13 Enc. Pl. & Pr., 864.

3.

Even if it had been in the power of the trial court to have granted an application for leave to file a supplemental answer,

after the cause was remanded for further proceedings, it would have been right for that court, in the exercise of its discretion, to have denied the application of plaintiffs in error for leave to file the proposed supplemental answer. (Folios 96, 97.) The Statutes of Minnesota, respecting the allowance of supplemental pleadings, (Gen. St., 1894, Sec. 5270), provide as follows: "The plaintiff and defendant, respectively, "may be allowed, on motion, to make a supplemental "complaint, answer, or reply, alleging facts material to the "case, occurring after the former complaint; answer, or reply."

Now, referring to the proposed Supplemental Answer set out in this record (folios 96 to 98) we observe that only subdivision I. thereof pretends to set forth any fact or circumstance of any kind occurring after the former answer; and said subdivision I. sets forth only the said facts of the offer by plaintiffs in error at the opening of the trial to permit defendant in error to take judgment foreclosing said equitable mortgage; the refusal of defendant in error to accept that offer, and the withdrawal afterward of that offer by plaintiffs in error. These were the very same matters which plaintiffs in error had caused to be made matters of record; they having occurred in open court as part of the trial proceedings (folio 17, p. 10), and which they had urged, both in the trial court and on appeal in the State Supreme Court, as ground of estoppel and defense against the claim of defendant in error for a foreclosure of the contract as an equitable mortgage, in case it should be held (as it finally was) that the original mortgages were extinguished by merger. We submit that, passing for the present the point already dwelt upon by us that these matters had become *res adjudicata*, it was right and proper for the trial court, in the exercise of its discretion, to deny the application made at that late day, after an unsuccessful trial of the same matters upon a record made in a settled "case" and carried to the State Supreme Court by the plaintiffs in error. We think it would have been an abuse of

discretion for the trial court to have granted such application, even if it could have exercised any discretion in the matter, But certainly a denial of such application in the exercise of a sound discretion, under the circumstances, should not be reviewed and disapproved by any appellate court.

Suidam v. Truesdale, 6 McLean (U. S.), 459.
State v. Williams, 90 Iowa, 513; 58 N. W. 904.
Schouweller v. Hough (S. Dak.), 63 N. W. 767, 777.
Voak v. Investment Co., 51 Minn. 450.
Investment Co. v. Nat. S. L. 7 B Ass'n, 51 Minn. 198.

Moreover, we here submit, (what was rightly decided by the State Supreme Court, on the second appeal in this case, (at folio 183), that this proposed supplemental answer was rightly disallowed by the trial court for the reason, (if there were none other), that it states no defense whatever. The doctrine of election of remedies has no application to the facts of this case. In the said contention between plaintiffs in error and defendant in error, as to whether the original mortgages were or were not merged in the contract of February 19, 1895, and thereby extinguished, the question was by no means one of election between two co-existing, inconsistent remedies, or rights, but only one of determining the particular relief to which defendant in error was entitled, in the pursuit of the one, sole, remedy of foreclosure, upon consideration of all the facts, which are fully set forth in the complaint. There never have existed two rights, or two remedies, as to which defendant in error ever had or claimed an election, or could be required to elect. He had but one remedy.—that of foreclosure of his lien upon the land. The character and amount of that lien depended upon the construction to be put upon the contract of February 19th, 1895. Did it, or did it not, supersede and extinguish by merger the original mortgages. It was impossible that both of these

alternatives should exist to afford the right to elect as between them. The doctrine of election of remedies has no application.

7 Enc. Pl. and Pr., Title Election of Remedies, p. 361, *et seq.*
In Re Van Nornum, 41 Minn., 494.
Marshall v. Gilman, 52 Minn., 88.

It cannot be contended that any other portion of the said proposed supplemental answer states any defense. Subdivision II refers to matters occurring long before the commencement of this action, the same matters, enlarged upon, which were pleaded in abatement in the answer of plaintiffs in error herein, (folios 15, 16), and which were abandoned at the trial, or at least not insisted upon. (Folios 18 to 20.)

The balance of said proposed supplemental answer contains only certain bald propositions of law, but no facts whatever.

There is no error of any kind in this record.

IV.

We do not think it either necessary or wise to discuss here the question of "due process of law," upon which there has been endless controversy and discourse in the books, with all of which this court is familiar. We will only say that it cannot be questioned upon this record that plaintiffs in error have been granted a fair hearing and trial of every question in this cause, and have had ample notice and opportunity for the making of every possible defense, and have availed themselves thereof, and have urged their every objection and contention with remarkable persistency upon the consideration of the courts, have been granted careful and patient hearing and consideration upon every point; so that there is not the slightest ground for their assertions that they

are deprived of property without due process of law, or have been denied the equal protection of the laws.

They certainly cannot with any show of justice make the bold demand that the courts should simply wipe out their indebtedness to defendant in error of more than $23,000, and the lien upon their lands securing the same, for reasons so trivial and so utterly untenable as those urged by them and disclosed in this record.

Respectfully submitted,

FRANK B. KELLOGG, ROBERT TAYLOR,
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Counsel for the Defendant in Error.

Supreme Court of the United States

1

No. 225.—October Term, 1902.

JOSEPH A. SAWYER and NELLIE A. SAWYER,
Plaintiffs in Error,

vs.

DANIEL S. PIPER, Defendant in Error.

2

ARGUMENT OF DEFENDANT IN ERROR.

If frequent and persistent repetitions of bald assertions, unaccompanied by argument or demonstration, but reinforced with loud asseverations of fancied oppressions, persecutions and bad faith, said to be chargable to the defendant in error and provable by alleged things existing outside the record, could be made convincing to the court, we have no doubt that the 3
briefs and printed argument of plaintiffs in error, in the present case, might lead to the belief that this defendant in error is guilty of extortion, or attempted extortion, wicked oppression and double dealing, of the worst form, throughout his entire course of dealing with plaintiffs in error; and that in this action he, the plaintiff in the court below, has been guilty at once (1) of improperly uniting several distinct and inconsistent causes of action, (2) of seeking to force the defend-

4 ants "either to abandon all defences and submit to spoliation, or try two actions (on a single demand) throughout the trial and supreme courts of the state, and one of them by writ of error to this court. Multiplicity of suits in its most odious form, coupled with intended oppression and spoliation," (3) splitting his causes of action and trying them by piecemeal, (4) deliberately electing to pursue one of two inconsistent and antagonistic remedies, in an effort to recover thousands of dollars in excess of his just claims, (5), after having pursued such inconsistent remedy (so deliberately chosen) to final 5 judgment and defeat, and, till then, persistently repudiated the other remedy and unqualifiedly rejected an offer by defendants, on the trial, of judgment for full relief thereunder, entirely shifting his position and taking up the abandoned and repudiated antagonistic remedy, as to which (they say) no trial had been had, or could have been had, and no defense had been made or offered or could have been offered by defendants, and (6) arbitrarily preventing, through erroneous rulings of the courts, the defendants from offering or attempting any defence against such new attack, or being heard upon the 6 same, although they showed themselves to have such defense and made due application for a trial and hearing thereon. (See the printed argument of plaintiffs in error, pp. 6, 7 and 8; brief in chief of plaintiffs in error, pp. 22 et seq.; 37, 38 and 39, etc., etc., and throughout their briefs and printed arguments, where these complaints are shown to be the gist of their contentions.)

Now, let us examine some of these complaints, in the light of the record, which is before this court.

(1.) If it were true that, in the complaint in this action several causes of action are improperly united, (which we do

not admit), it is clear that such defect was waived by de- 7
fendants. The statutes of the state of Minnesota relating to pleadings and practice contain the following provisions: "The "defendant may demur to the complaint within twenty days "after the service thereof, when it appears upon the face "thereof, either: First, that the court has no jurisdiction of "the person of the defendant or the subject of the action; "second, that the plaintiff has not legal capacity to sue; "third, that there is another action pending between the "same parties for the same cause; fourth, that there is a defect "of parties, plaintiff or defendant; fifth, *that several causes of* 8
"action are improperly united, sixth, that the complaint does "not state facts sufficient to constitute a cause of action." (Gen. St. (Minn.) 1866, Chap. 66, sec. 74, as amended in Laws of 1867, c. 62, sec 5; Statutes of Minnesota, 1894, Vol. 2, sec. 5232.)

"When any of the matters enumerated in section seventy-four "do not appear upon the face of the complaint, the objection "may be taken by answer." (G. S. 1866, c. 66, sec. 77: Statutes of Minnesota, 1894, Vol. 2, sec. 5234.)

"If no such objection is taken, either by demurrer or 9
"answer, the defendant is deemed to have waived the same, "excepting only the objection to the jurisdiction of the court, "and the objection that the complaint does not state "facts sufficient to constitute a cause of action." (G. S. 1866, c. 66, sec. 78; Statute of Minn., 1894, Vol. 2, sec. 5235.)

This record shows that no objection was taken to the complaint herein, of the nature complained of now for the first time, by plaintiffs in error, either by demurrer, or by answer. Therefore, if such defect existed at all, it was waived. Defendants, without objection went to trial of any

and all the issues and causes of action presented by the complaint.

(Tr. of Rec., folios 14, 15, 16, 17, 18, 19, 20.)

The only objection made to the complaint in any stage of the proceedings was made in the briefs and argument of plaintiffs in error upon the first appeal to the state supreme court, (confusingly interwoven with the two other claims there urged, that defendant in error had elected to bring action only for foreclosure of the original mortgages and declined to accept the offer of plaintiffs in error of judgment foreclosing the "equitable mortgage" alone, and that the plea of defendant in error for at least a foreclosure of the contract of February 19, 1895, for the amount the court finds due thereon, in case it determines that the original mortgages were extinguished thereby by merger therein, was a "shifting of plaintiff's position" which could not be allowed on the appeal); that the plaintiffs said complaint was not sufficient in its allegations and prayer for relief to entitle him to a judgment foreclosing that "equitable mortgage." (Tr. of Rec., Subdiv. VIII, at beginning of fol. 54; Subdiv. II in folios 62, 63; and Subdiv. I, in their Reply Brief, in folios 67, 68). But in this objection that court overruled them, and decided rightly against them, using the following language, respecting the complaint, at the last of folio 106 and first of folio 107, to wit: "The complaint in "this action set up the execution, delivery and record of each "of the mortgages, the assignment of the three, which in "point of time preceded that in which plaintiff was mortgagee, "and the recording of each assignment, the making of the "contract before referred to and the default of the defend-"ants in its terms and conditions. Judgment was "demanded to the effect that by reason of the default

"on defendant's part the original sums due upon the 13
"notes secured by the four mortgages be adjudged
"due, and a foreclosure of each mortgage be had for
"the respective sums due, with a sale of the mortgaged prop-
"erty to satisfy the debts. Or that the contract itself be
"foreclosed by sale of the premises therein described to satis-
"fy the amount due thereon with attorney's fees, costs and ex-
"penses. Further and other equitable relief was also demand-
"ed." And again, when treating of this very point as to plaintiffs being entitled to a judgment foreclosing this contract as an equitable mortgage, that court says in folio 116: 14
"As before stated the complaint was broad enough to have
"justified findings upon which could have been predicated
"conclusions of law in accordance with the views herein
"expressed and ordering a foreclosure of the equitable mort-
"gage for the sum due on the contract, with proper costs of
"the proceedings, and findings of fact actually made warrant
"such conclusions, except that the sum due was not ascer-
"tained." Thus was this objection to the sufficiency of the complaint to warrant a foreclosure of the "equitable mortgage" adjudicated against plaintiffs in error, and, as we understand them, has never been, and is not now urged further 15
by them. The point also made by plaintiffs in error on that appeal, interwoven with that objection to the complaint as above stated, (and so interwoven also with the chief point of said plaintiffs in error above referred to,—that of alleged "election by defendant in error of an inconsistent remedy," amounting to an estoppel against him, to which we will hereafter make further reference), viz., their said point that to allow plaintiff to recover judgment of foreclosure of that "equitable mortgage" would be to permit him to shift his

16 position from that occupied by him in the court below, and make a total change of base, was also fully urged upon that first appeal, and was also necessarily decided against them in and by that judgment of that supreme court, and became "res adjudicata." We do not understand that plaintiffs in error have since urged, or do now urge that point as to "shifting of position". But they do still interweave it with their other complaints as evidencing bad faith, oppressive conduct, etc.

But we submit that the complaint herein does not in
17 fact set forth any more than one cause of action. Plaintiff had a certain aggregate amount due him from defendants, which originated, at least, in the four original mortgages and the notes secured thereby, and which were not formally released, and were still held by plaintiff, together with the deed of defendants to him of February 19, 1895, and the contract of that date, and were all alike affected in some material way by that contract and deed and the escrow deed held by the depositary, Mr. Woodman, either merging them all in the later transaction, as a substituted
18 equitable mortgage, in which case they were still the basis of such equitable mortgage and proper matter to be set forth therewith in the complaint, or so modifying and affecting them all, by relieving them of all defaults already having occurred in any of the terms and conditions of them or any of them, and providing that no default therein should occur, thereafter, save by the occurrence of a default in the payment of the monthly accruing sum of $100, provided by that contract, so that no cause of action upon any of them could arise except by occurrence and proof of such default in payment of that sum of $100 each month, and giving to the

plaintiffs the option to pay at any time or times, in sums of 19
not less than $50, as they themselves might determine, the aggregate amount of $20,400, in addition to such monthly payments of $100 continuously (diminished from time to time after any payments toward such $20,400, in the proportion that such latter payments should bear to the entire $20,400), and become thereby entitled, upon such full payment of such $20,400, as a principal sum, in addition to such continuous monthly payments, to a delivery of said escrow deed of warranty, which would, of course, then convey the title in fee absolute back to defendants free of all incumbrances, and 20
would extinguish alike all such mortgages, said contract included.

In either case there was but one cause of action, of which said contract and the default in its terms was an essential ingredient, and but one remedy, to wit: the foreclosure of the lien held by plaintiff securing the debt, whatever that might be determined to be. If there was such extinguishment by merger of the original debts and mortgages, it seems clear that, under the contract there remained no personal liability against defendants, or either of them, for any thing 21
more than the monthly payments, for which any personal judgment could be obtained; and it seemed at least very doubtful whether there was any such lien created as security for the enforcement of payment of the said $20,400, as could be enforced by foreclosure, since it not only never was to become due, by the terms of the contract, but its payment at all seems to have been made optional with defendants.

For ourselves we have never had any doubt that it was not the intention of the parties to that contract,—and especially not the understanding, or the intention of the plaintiff,

22 who never had any conception of such a thing as "extinguishment by merger,"—that it should thus extinguish those original debts and mortgages. Whether the said contract did effect such extinguishment or not, was and is a pure question of law, to be determined by the construction which should be given to that contract,—a matter to be determined only by the "infallible" final judgment of the court of last resort if either party should carry its decision to such court; which, in this case, was the supreme court of the State of Minnesota. Such final judgment is necessarily "infallible",
23 in the sense that it is conclusive and ends the questioning.

In bringing and prosecuting this action plaintiff did plead all the facts, setting up the whole of the mortgages and notes, their assignment to plaintiff, the contract and deeds of February 19, 1895, all the facts attending them, the payments made, the defaults, demands, and failures of defendants, plaintiff's performance on his part, etc.; and asked for judgment foreclosing each and all of said mortgages and said contract for the amount which should be found to be due to plaintiff.

24 It is shown clearly by the record of the trial (folios 14 to 20 inclusive, et seq.) that it was this question of extinguishment of the original securities by merger that constituted the only difference and matter of contention between the parties at that time. The offer of defendants, at the beginning of the trial, to permit judgment to be taken by plaintiff of "foreclosure in the case based upon and for the amount provided "in the contract or agreement," is ample proof that he understood all this, and recognized that plaintiff must be conceded the right to relief to that extent, at least; and that they would be glad to end the controversy on that basis,

without an adjudication by the court upon that disputed question of law. 25

For plaintiff to accept that offer would be to abandon his own views as to what should be the proper decision of the question, and concede all that defendants contended for. He was under no obligation to do that. He had a right to the determination of the court upon that question, and there was clearly no case for a requirement that he elect either to repudiate the contract, or to abandon and repudiate all claim under the original securities.

It will be seen by a simple computation that, according to the original securities, if they were not extinguished, plaintiff would be entitled to at least $2000 more than the whole amounts even mentioned in the contract,—a sum worth seeking a judicial decision of the "merger" question for, and a sum to which he was clearly entitled, morally, at least. 26

Besides, it will be noticed that there was an indefiniteness and uncertainty about the offer of judgment thus made. It was not an offer of judgment of foreclosure of the "equitable mortgage" for the sum of $20,400 of principal and $100 for each month since default was made in such monthly payments, nor for any definite sum. It would still leave to be contested the question, "How much is provided in the contract, for which such foreclosure is conceded and acepted?" Plaintiff appears by the record to have had some experience, prior to that time, along that line. In the previous action between the parties, concerning which defendants make great complaint, and which was pleaded in their original answer herein as an action for the same cause between the same parties, pending in the same court, and therefore pleaded in abatement, (folios 15, 16), to which plea plaintiff replied, showing that such action 27

had been by judgment of the court dismissed without prejudice to plaintiff, (folios 16, 17), being the same action the records and proceedings in which defendants again sought to set up in their proposed supplemental answer, as alleged "supplementary" matters in defense, after the remand of this cause to the trial court, upon determination of the first appeal (folios 96, 97, Subdiv. II, of such Supplemental answer), which record was offered in evidence by defendants (folio 111), and thus came into this record, as evidence offered and rejected by the court, under exception by defendant, and appears in the record at folios 115 to 133, inclusive, a decision by the court was at one stage of that cause obtained, setting out findings, and direction for foreclosure of that same contract, (after default in its terms for the monthly payments of of $100), for the amount provided therein, which amount was then adjudged to be only the sum of the accrued and unpaid monthly payments, with interest aggregating only $1,135.83, (folios 123 and 124). After which that action was dismissed by judgment, without prejudice to plaintiff, (folios 132, 133). Now, it seemed not unlikely that an acceptance of the offer of defendants at the trial of this cause, to "allow the plaintiff to "take a decree of foreclosure in this case based upon and for "the amount provided in the contract—or agreement," (folio 17), might prove equally disappointing, in view of the opportunities appearing to be afforded for further contention as to the amount that could ever become due under the provisions of that contract which appeared to merely give defendants an option to pay the $20,400 of principal "at such time or times as may be determined by" defendants themselves.

We think it clear that plaintiff had a right to insist upon a judicial decision of the disputed question of law as to the

extinguishment of the original securities, and of the nature 31
and effect of the contract, and the rights of the parties thereunder, in the light of all the facts of the case.

(2.) This course of action was in no sense arbitrary, oppressive, extortionate, or oppressive, and was no evidence whatever of bad faith in the plaintiff. We think these vigorous charges of extortion, oppression, spoliation, and bad faith, made in the briefs and argument of plaintiffs in error, come with ill grace from them, in view of the manifest fact that this very contract was evidently a generous concession to them by plaintiff, conditionally (at least) giving them a de- 32
duction from their just debts to him of more than $2,000, and all the time they should elect to take, for the payment of the reduced principal, conditioned only upon their prompt payment of the interest, (also at a reduced rate), at the end of every month, continuously, &c.; and especially, in view of the patent and brazen effort of defendants themselves, in and by these unconscionable proceedings, not only to get rid of all personal liability to plaintiff on account of an indebtedness of more than $25,000, but also to get back their 790 acres of land, entirely freed from all liens securing such just indebted- 33
ness. For, stripped of its concealments and groundless complainings, the course of action of plaintiffs in error in this cause, certainly stands forth in just that uncommendable attitude. It is clearly toward that end that they have been struggling, in all this prolonged litigation.

(3) We come, now, to the matter of defendants' complaint that they were wronged by the judgment of the State Supreme Court, upon the first appeal, in adjudging that plaintiff was entitled upon the record of the pleadings and trial, to a judgment foreclosing the "equitable mortgage,"

and remanding the cause to the trial court with specific instructions to amend its findings by ascertaining and finding the amount due thereon, (a mere matter of computation, since all the facts bearing upon that question, as to the terms and provisions thereof, the amounts paid thereon, defendants' default, were matters of admission at the trial). (Folio 18.) Defendants claim that upon that appeal they did not present, or submit, to that court, and had not presented and urged before the trial court, as a defense against plaintiff's claim for a recovery of such judgment for foreclosure of said "equitable mortgage," in case it should be held that the original securities were extinguished thereby and merged therein, the alleged "election" by plaintiff to stand upon and pursue solely the right to a foreclosure of the original mortgages, and to repudiate wholly and unconditionally the contract, or equitable mortgage, because he declined said offer of defendants at the trial to allow plaintiff to take a decree of such foreclosure. They admit in their briefs and argument here, that they did present and urge such "election" and pursuit of the foreclosure of the original mortgages, only, and such rejection of their said offer to allow such decree of foreclosure of the "equitable mortgage," both before the trial court, in their motion for an amendment of its findings (folio 37, subdiv. III), and before the State Supreme Court on that appeal, (folio 54, subdiv. VIII, folio 62, subdiv. II, folios 80, 81, on page 44), for the purpose of defeating plaintiff from obtaining such foreclosure of the equitable mortgage in this action and to secure a dismissal of this action; but attempt to make the distinction that such presentations of such alleged "election" were then only made as a defense against such recovery in this action, and not as an absolute defense by way of estop-

pel against such recovery in any action whatever, or at all, 37
because such absolute defense by way of estoppel did not become complete till after the judgment of the supreme court on that first appeal, in which it held that such original mortgages were extinguished by the merger; while their application after the remand for leave to file the proposed supplementary complaint setting up the same matter of alleged election to pursue the alleged inconsistent remedy, was an offer of a perfected and absolute defense, by way of perpetual estoppel, against such recovery by plaintiff of judgment of foreclosure 38
of such equitable mortgage in this, or any other action; it being claimed by them that such perfected defense by way of absolute estoppel did not arise till the rendition of judgment in the appellate court, declaring the extinguishment of the original mortgages by merger in the equitable mortgage; plaintiff having had till, and during all the time from the trial in the lower court till such judgment of the supreme court a "locus penitentiæ" in which he could change his tactics by seeking the true remedy and ceasing to rely upon the wrong and impossible, inconsistent one. (See Brief in Chief of 39
plaintiffs in error, pages 16, 17, 18 and 19). If there be anything in this "locus penitentiæ" theory, and the distinction that in such a case as this, no election of remedy is complete till the final judgment of the appellate court be rendered, then we submit that, in the present case, the record not only does not show, but could not show, in the nature of the case, any such complete "election" in the trial court, and that it does show that in the appellate court, if plaintiff had ever been traveling the road leading toward such an "election," he left it in that court, and was there claiming his right to a judg-

ment of foreclosure of the equitable mortgage, if it be held that it has swallowed up the original mortgages by merger; for we find the plaintiffs in error themselves so complaining in their briefs, and vigorously objecting to such claim being allowed, charging that it is an unwarranted "shifting of his position," "changing of base," etc. If, therefore, there be anything in this fine-spun distinction, it is clear from the record relied upon by plaintiffs in error themselves, and made by them, that defendant in error did not make such a perfected "election" at all. Besides, in that case, the proposed supplemental answer of the defendants, setting up the "election" relied upon, (folio 96, subdiv. I) stops far short of averring such perfected election by plaintiff as to constitute such defense as they claim to have tried to get a hearing upon and were deprived of such hearing, for there they allege only the said offer at the trial to allow plaintiff to take judgment and decree foreclosing the lien of his equitable mortgage and for the amount due and unpaid on such equitable mortgage; that said offer was then, and in open court, declined by plaintiff, and such relief refused by him. No other election or act of that nature is alleged therein. And to show further that no such perfected election could have been persistently pursued by a continuous rejection of such offer of defendants, till plaintiff had had his "locus penitentiæ extending from the "trial until the judgment of the supreme court," they add the allegation "that thereafter, and before said cause was "submitted to this court" (the trial court) "for decision, said "defendants withdrew said offer." How could plaintiff continue to reject the offer, after it was withdrawn?

Plaintiffs in error evidently saw the want of logic in this "distinction" when set up beside these allegations of the pro-

posed supplemental answer, for they next hedge by asserting 43
that it is a settled rule of the courts of Minnesota, that when application is made by a pleader to file a supplemental answer, unless he be barred, such filing thereof is matter of right and the court has no discretion to refuse it, and its sufficiency is thereafter to be determined in the usual manner. (Brief of plaintiffs in error, p. 23.) Now, we submit that no such sweeping rule exists in Minnesota, as is shown in the very case cited by them on that point, (Malmsten vs. Berryhill, 63 Minn. 1): for in that very case the court sustains the action of the trial court in its refusal to allow the prof- 44
fered supplemental answer. We consider it simply absurd to hold that, when a supplemental answer is offered which does not state any defense at all, the court must allow it and then have its offensive presence removed by demurrer, motion to strike out, or some other method. Plaintiffs in error erroneously assert that this supplemental answer was objected to and disallowed on the sole ground that under the mandate of the supreme court the trial court had no power to allow it. While the objection was made and rightly made on that ground, it was also made on the ground distinctly specified 45
"that the proposed supplementary answer did not set up "facts constituting a defense." (Folio 112).

We think, at any rate, that the attempted distinction between urging an alleged matter of defense against a recovery sought in the action, and urged only as a defense against such recovery being had "in this action," and the urging of precisely the same matter as a defence in the same action at another time against the same recovery therein, claiming it to be an absolute defense by estoppol in that action or any other action, is a "distinction without a difference," and is

46 entirely too fine to enable one thereby, after full hearing and determination by judgment of a live Court, upon such defense as thus first offered and urged, to obtain a second trial and determination of that same matter of defense in the same action, against the same recovery, although so urged as such absolute defense by estoppel; in that action, or any other.

In the matter here under consideration, precisely the same matter respecting the alleged election of remedies, unchanged and unmodified by any additional allegation of fact or circumstance, as was sought to be set forth in this disal-
47 lowed supplemental answer, was previously presented by these same plaintiffs in error and urged with a full and careful hearing by the appellate court, on the appeal there tried, and was by that court fully and fairly heard and was duly determined by that court, against their contention, and thus became res adjudicata, and they thereby had their "day in court," and such proceedings constituted "due process of law." Plaintiffs in error were fully granted and accorded the equal protection of the laws.

We submit that the case of Warner vs. Godfrey, 186 U.
48 S. 365, cited and apparently relied upon by plaintiff, has not the slightest semblance in substance, or principle, to the present case. We will not take the time and space to state that case and its facts and the points decided, which would necessarily be quite lengthy to be complete and understandable. But we invite its examination by the court, unless it is so fresh in the minds of the Honorable Justices thereof, as to make such examination unnecessary, and a comparison of the same with the case at bar. Nor is the case of Hovey vs. Elliott, 167 U. S. 409, at all in point here.

We submit respectfully that, as is said by the state

supreme court of Minnesota in this case, (fol. 183), "The doc- 49
"trine of election of remedies has no application to the facts
"of this case."

There was only one cause of action and but one remedy sought, and pursued by plaintiff. The particular relief to which he was entitled depended upon the proper construction to be given to the contract of February 19, 1895, which construction must be determined by the proper court having jurisdiction, which in this case, was the Supreme Court of the state of Minnesota. It was purely a question of law for the court. No person or party could possibly have any right of election, to determine it; and no party can be 50
held estopped, nor to have waived any right by urging his own views, or those of counsel for him, upon the attention of, and for the aid possibly of, the court in its reaching a determination of the question.

It surely is not necessary to answer the complaints made by plaintiffs in error because they were not permitted to set forth by supplemental answer the facts and record of the former action between these parties, which had been disposed of by dismissal without prejudice, long before the commencement of this action, and which had been pleaded by plaintiffs in error, as matter in abatement, as a former action pending 51
between the same parties for the same cause, in their first answer, and its dismissal without prejudice alleged by defendant in error in his reply to such answer, and which plea in abatement was evidently abandoned on the trial, or at least was not there urged. (Folios 14 to 20, inclusive, and folio 97, subd. II, and folios 111 to 133, inclusive.) There is nothing in it in any way material, or pertinent to the present case, or stating any defense, nor any thing of a supplementary nature.

There is no error in this record. Plaintiffs in error have

52 been in no manner deprived of the equal protection of the laws, nor of any of the immunities or rights of citizens, nor deprived of life, liberty, or property without due process of law. They have had their "day in court," and have been granted a full, free and fair hearing on all the matters under consideration, at any stage of the proceedings, and they have nothing to complain of.

Respectfully submitted,

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